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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 132

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of ALLEGHANY CORPORATION similarly situated,
Petitioners,

against

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY AND ALLEGHANY CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT CHARLES T. IRELAND, JR.

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vs.

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT CHARLES T. IRELAND, JR.

The action from which this appeal derives, *Murchison, et al.* v. *Kirby,* United States District Court, S.D.N.Y., 60 Civ. 3511 (R. 166) (*"Murchison"* herein) seeks to set aside as to respondent Allan P. Kirby ("Kirby" herein) a judgment of the New York Supreme Court* (the *"Zenn"* judgment herein) approving as "fair, reasonable and adequate" the settlement of a stockholders' derivative suit

* Zenn, et al. v. Anzalone, et al., New York Supreme Court, New York County, Index No. 7244/1954 (R. 701).

brought in 1954 on behalf of Alleghany Corp. against its directors, on the ground that the judgment had been procured by Kirby's concealment from the *Zenn* Court and Referee of certain documents claimed to be material with respect to an exchange transaction entered into between Alleghany and certain of its directors (Kirby, Robert R. Young and Robert W. Purcell) in 1949 and 1950, known as the "1949-50 exchange". The present action also sought to reassert the *Zenn* claims against Kirby.

The respondent Charles T. Ireland, Jr. ("Ireland" herein) was not a party to the *Zenn* action or to any of the transactions that were the subject of that action, and did not participate in any of the hearings before the *Zenn* Referee. Petitioners concede that "It is not contended that Ireland knew of the information concealed in the hearings before the Referee" (Pet. Br. p. 40, fn. 43). The present action, however, charged him with fraudulently procuring the *Zenn* judgment through a "corrupt bargain" with Randolph Phillips, a representative of the objecting stockholders therein and of stockholders in a related action in the United States District Court for the Southern District of New York* (*"Breswick"* herein). The complaint herein sought, by way of relief against Ireland, an accounting, reimbursement of expenses paid by Alleghany in this action, and counsel fees (R. 189).

After trial before the District Court the claim against Ireland was dismissed on the ground "that the evidence** was all completely to the contrary" (R. 2317). No appeal was taken from this dismissal. (Pet. Br. p. 19).

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* Breswick v. Briggs, S.D.N.Y., Civil Action No. 98-371.

** The review of this evidence by the District Court is at R. 2306-2317.

Questions Presented

The only question presented by the petitioners which purports to involve Ireland is No. 4* (Pet. Br. p. 4), i.e., whether Ireland, in appearing as counsel for Allegheny in the *Zenn* settlement proceedings, had a duty to advise the court that he had participated in settlement negotiations as the representative of Kirby, a *Zenn* defendant and Alleghany director.

On the record of this case petitioners' Question No. 4 is not reached as to Ireland for the reason that neither the complaint nor the Statement of Issues presented for trial any claim of failure by Ireland to reveal to the *Zenn* court his representation of Kirby in settlement negotiations.

We submit that this appeal, insofar as it relates to Ireland, is frivolous and a sham.

Counter-Statement

For a more complete statement of the background of this case we refer the Court to the Counter-Statement found in the separate brief on behalf of respondent Allan P. Kirby, and more particularly to pages 5-9, 23-24, 40-51 thereof.

In spite of the dismissal of the "corrupt bargain" charge against Ireland, petitioners' brief states that: "In pursuit

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* "4. Must a director-defendant who controls the corporation and who seeks court approval of a settlement of a derivative action against him reveal to the court that the attorney who was appearing in the proceedings as the representative of the corporation had in fact been the director's personal representative in the settlement negotiations and had been substituted as attorney for the corporation solely to facilitate the settlement hearings? Did the attorney have such a duty?"

of Kirby's interest, he [Ireland] had offered a bribe to the plaintiffs' representatives" (Pet. Br. p. 39). The term "bribe", of course, refers to the non-existent "corrupt bargain". In view of the District Court's contrary finding, from which no appeal was taken, this statement is improper, and could cause grave harm to Mr. Ireland, a member of the bar in good standing. Unfortunately the statement is all too characteristic of the conduct of petitioners' counsel in this entire case.

After deciding not to appeal from the District Court's dismissal of the only claim against Ireland, petitioners' counsel, for the first time on appeal, raised the question of whether Ireland, after appearing as counsel for Alleghany in *Zenn* and *Breswick*, concealed from the court his representation of Kirby in the settlement proceedings. Since this was not an issue presented for trial, Ireland has not been afforded any opportunity to offer proof, or to cross-examine, as to the nature and extent of his representation and his disclosure of it to these courts.

The portions of the Counter-Statement of the separate brief submitted on behalf of respondent Allan P. Kirby, referred to above, furnish facts of record demonstrating the baselessness of petitioners' new contention. Specifically we direct this Court's attention to the following:

> (1) *Zenn* and *Breswick* were hotly contested proceedings. Alleghany's role was essentially a neutral one, with its interests being vigorously represented by many counsel, including plaintiffs' general counsel, Pomerantz, Levy & Haudek, described by the Court of Appeals as "most skilled and experienced . . . in ferreting out fraud on the part of directors" (R. 2331); and by objectants' counsel, Graubard & Moscovitz. In *Breswick* its interests were likewise actively represented by many attorneys, including Rosston, Hort & Brussel.

(2) Prior to Ireland's negotiation late in 1959 of Kirby's separate settlement and his appearance for Alleghany, its counsel in *Breswick* also represented various director-defendants and the Court was well aware of that counsel's dual representation. Likewise, in *Zenn* it was represented by an attorney closely associated with, and formerly employed by, the firm representing Young and negotiating on his behalf.

ARGUMENT

POINT I

The charges now made against Ireland were never tried below and are based on factual assertions which are false.

1. Petitioners' Charges are Contrary to the Record Facts in this Case.

(a) *The "private deal for Phillips"*:

At pages 17 and 39 of their brief, petitioners state that Ireland, on Kirby's behalf, made an offer of a "private deal for Phillips" (Pet. Br. p. 17) during settlement negotiations held in the fall of 1959.

This particular charge was first made as part of the "corrupt bargain" theory and was dismissed by the trial judge with the comment that "the evidence was all completely to the contrary." (R. 2317) The District Court found, as to the particular offer referred to by petitioners at page 17 of their brief, that it "was not to be a secret matter but something which was to be revealed to the Court as part of the settlement." (R. 2308) Indeed, in view of the evidence, the trial court could hardly have found otherwise. A contemporary memorandum by Phillips reveals that when the offer was made, "CTI [Ireland] explained it was APK's [Kirby's] idea it be

publicly announced and put before [the] Court." (Ex. R.P. 27, R. 2287)

(b) *The concealment of Robert R. Young's "Perjury"*:

Petitioners charge Ireland with having failed to disclose the alleged "perjury" of Robert R. Young. This is referred to by petitioners in three places (Pet. Br. pp. 17, 18, 39). For instance, at page 39, petitioners state that:

> "Neither Kirby nor Ireland disclosed that Ireland now knew, and had informed Kirby, that Young had given perjured testimony during the early hearings (R. 417)."

Petitioners refer to a deposition by one William Eppler in which he stated (R. 417) that Kirby "had been told by Ireland that Young had perjured himself in his testimony" and "that Ireland would have to agree with Mr. Phillips' interpretation of Mr. Young's testimony."

Perjury is a crime punishable in New York State under the Revised Penal Code by imprisonment for a period up to seven years and by a fine in the event financial gain has been realized from the felony.* Accusations that such a serious crime has been committed should not be made lightly. Here petitioners, in addition to making this serious accusation against a man now deceased, attempt to create the misleading impression that the "perjury" had occurred "during the earlier hearings" (Pet. Br. p. 39). Ambiguity of the sort is evidently designed to convey the impression that the "perjury" was related to the present proceeding.

Indeed, Judge Friendly was apparently persuaded to this erroneous conclusion, since he quoted it (R. 2359-2360, fn. 3) in support of his conclusion that the *Zenn* Referee had been misled.

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* The Revised Penal Code, enacted in 1965, will not become effective until September 1, 1967. The present law provides a penalty of up to five years imprisonment (N. Y. Penal Law §1633).

The record shows that the claimed "perjury" was not at all related to the 1949-50 exchange. The testimony of Young related to a different matter, i.e., a "put" arrangement between the Murchisons and Alleghany (R. 485), which had been the subject of an examination of Young by Henry J. Friendly, Esq. in a different case, *Young* v. *Ebbott,* before his appointment to the Court of Appeals. That should be the end of the matter as far as the present case is concerned.

In view of the seriousness of the charge, however, we set forth briefly fragments about it in the present record.

The ultimate basis for this charge was explained by Phillips at the trial below:

> "That was the evidence I referred to yesterday, that when Mr. Young testified in *Young* v. *Ebbott,* he had testified truthfully under examination by then attorney Henry Friendly that there was an unconditional put by Alleghany Corporation to Clint Murchison, Sr. However, Mr. Pomerantz never discovered that testimony and when Mr. Young was deposed a year later in *Zenn* v. *Anzalone* by Mr. Pomerantz, Mr. Young under oath stated he had never seen the put agreement, that it was not unconditional—I am giving it in substance—and that the agreement was drawn up by his green staff at that time. I had read that testimony. I informed Mr. Graubard of both the *Young* v. *Ebbott* testimony and the *Zenn* v. *Anzalone* testimony. There came a time when Mr. Young was put on the stand in *Zenn* v. *Anzalone* where he adhered to his later testimony and was not confronted with the *Young* v. *Ebbott* testimony." (R. 485)

Neither Eppler nor Phillips was a lawyer. However, Thomas Daly, Young's attorney in both *Young* v. *Ebbott*

and *Zenn* v. *Anzalone,* testified during his pre-trial examination by petitioners' counsel as follows:

> "A. I remember a conversation with Mr. Ireland, or maybe it was more than one, I don't recall, and I don't recall the date of it, except it was sometime in this period, in which he reported to me that Phillips, if the hearings went on, would be able to show that Mr. Young had perjured himself in his testimony, I think it was in the Young against Ebbott suit, in connection with the put, and I told Mr. Ireland that I knew all about that testimony, there was nothing to worry about it, and it was just some more of Mr. Phillips trying to scare him. That is the conversation as I remember it, the substance of it." (Dep., p. 52)

Daly's personal knowledge is attested by the fact that the transcript of testimony on the day when Young was examined by Friendly in *Young* v. *Ebbott* shows that Daly was present.* Daly was also present during the *Zenn* hearings.

Petitioners' accusations of perjury provide no basis for the present charge of concealment against Ireland.

(c) *The "dual representation" of Ireland*:

As to this aspect of the charge, which is discussed more fully in Point II, pp. 9-11, *infra,* we wish merely to note that counsel for the original *Zenn* plaintiffs, counsel for the objectants who had blocked final settlement and counsel for each of the individual defendants were all aware of Ireland's activities in helping to negotiate a settlement. Any

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* See, for instance, the exchange of counsel when Mr. Friendly attempted to go beyond the issues in *Young* v. *Ebbott* and to interrogate Young with respect to the 1949 IDS exchange transaction that is the subject of the *Murchison* case. (Appendix p. 4a, *infra.*)

of them could have informed the court of Ireland's role. The reason no one did is that there was nothing wrong with Ireland's conduct, and they all realized it.

2. This Charge Was Never Made in the Trial Court and Should Not Now be Considered.

Petitioners now argue (Brief pp. 38-40) that when Ireland appeared as attorney of record for Alleghany in *Breswick* and *Zenn* in December, 1959, he concealed from these courts the fact that he had, as Kirby's representative, conducted settlement discussions with representatives of the *Breswick* plaintiffs.

Petitioners omit to inform this Court that this charge against Ireland was never presented to the trial court in any shape or form; nor was it in any way presented in the amended and supplemental complaint or in the Proposed Statement of Issues—all with the result that the trial court had no opportunity to consider this "issue," and the defendants had no opportunity to present evidence in opposition to the charge now made. The law is well established that arguments not presented at trial may not be raised for the first time on appeal. *United States* v. *New York Tel. Co.*, 326 U.S. 638, 650-51 n. 18 (1946); *River Plate & Brazil Conferences* v. *Pressed Steel Car Co.*, 227 F.2d 60, 63 (2d Cir. 1955); *Patent & Licensing Corp.* v. *Olsen*, 188 F.2d 522, 525 (2d Cir. 1951); *American Air Export & Import Co.* v. *O'Neill*, 221 F.2d 829, 831 (D.C. Cir. 1955). The Court of Appeals accordingly did not pass upon this newly-raised issue.

We respectfully submit that this Court should likewise refrain from passing upon this most recent charge by petitioners.

POINT II

Assuming arguendo that Ireland's role as Alleghany's attorney is properly before this Court, petitioners' contentions must still be rejected.

Petitioners argue that Ireland, as counsel for Alleghany, was involved in a conflict of interest because of his earlier negotiations on behalf of Kirby. They imply that it was Ireland's duty to prosecute the derivative claims in *Breswick* in the federal court and the more far-ranging claims in *Zenn* in the state court.

The fact is that in a derivative action the court looks to counsel for the stockholder plaintiffs and not to counsel of record for the corporation, a nominal defendant. *Rogers* v. *Hill*, 34 F. Supp. 358, 369 (S.D.N.Y. 1940); *Otis & Co.* v. *Pennsylvania R. Co.*, 57 F. Supp. 680, 684 (E.D. Pa. 1944). In fact Judge Walsh, in granting the original injunction in *Breswick*, to protect the *Breswick* plaintiffs with respect to their claims, stated:

> "The fact that the lawyer who represented Alleghany Corporation in executing this stipulation was closely associated with the law firm which represented the directors does not establish collusion. It is not to be expected that the lawyer representing the corporation will be unfriendly with the directors thereof or their counsel. The real adversary party expected to protect the interests of the stockholders is the lawyer who represents the stockholder group . . . ." *Breswick & Co.* v. *Briggs*, 135 F. Supp. 397, 403 (S.D.N.Y. 1955)

1. Ireland's Role in the Federal Court.

In the *Breswick* proceedings in December 1959, the merits of the proposed settlement were not before Judge Dimock. The issue before Judge Dimock was simply whether the application joined in by the *Breswick* plaintiffs for the vacating of the injunction theretofore secured by them should be granted. This was specifically made clear to Judge Dimock by Mr. Teitelbaum, who, as counsel for Kirby, had conducted the final negotiations with Mr. Brussel (counsel for the *Breswick* plaintiffs) and with Mr. Graubard (counsel for the *Zenn* plaintiffs) (R. 920). Mr. Brussel affirmed and emphasized to Judge Dimock that the merits of the settlement were not before the District Court:

> "Mr. Brussel: Yes, I think your Honor should say that because the purpose of Judge Walsh's injunction was to permit us to negotiate in good faith with defendants, and we are coming here and representing that we have negotiated in good faith and reporting to your Honor that we have accomplished the purpose of the injunction as to defendant Kirby. That is the reason that I think your Honor should act and vacate this injunction as to him. We are at long last able to say that as to this one defendant we have gotten what we think is the maximum obtainable on the best possible terms, and in view of that we are prepared to take our chances in the State Court." (R. 925-926)

Ireland appeared as counsel for Alleghany, but his role was entirely a passive one. The federal court was looking to Brussel for information as to whether the *Breswick* plaintiffs had been fairly dealt with. Ireland's role was the purely administrative one of entering an appearance for the corporation.

2. Ireland's Role in the State Court

In *Zenn* the settlement was submitted to the State court, for final approval, by Graubard, counsel for the Alleghany stockholder who intervened in *Zenn* (R. 2103). Ireland was counsel of record for Alleghany. Teitelbaum was "of counsel" to Ireland. When the final settlement was presented to the court and approved by it, Mr. Teitelbaum specifically informed Justice McGivern that he appeared as counsel to Alleghany while also acting as attorney in fact for Mr. Kirby (K-357, R. 2112).

Justice McGivern was thus made fully aware of the fact that Kirby's counsel was engaged in the dual representation of Kirby and Alleghany; the record shows no objection by him to this procedure. The reason, we submit, is clear: there was nothing wrong with such representation, since Alleghany appeared as a nominal party, whose interests were vigorously prosecuted by counsel for the stockholder plaintiffs.

Conclusion

We respectfully submit that, for all of the foregoing reasons the Writ of Certiorari as to Charles T. Ireland, Jr. should be dismissed as improvidently granted or in the alternative the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

WALTER R. MANSFIELD,
Attorney for Respondent
Charles T. Ireland, Jr.

EUGENE V. ROSTOW,
GRANVILLE WHITTLESEY, JR.,
JOHN J. MCCANN,
Of Counsel.

February 21, 1966

APPENDIX

Supreme Court of the State of New York

COUNTY OF NEW YORK

ROBERT R. YOUNG, *et al.*,

Plaintiffs,

—against—

PERCY J. EBBOTT, *et al.*,

Defendants.

Before:

HON. HARRY GROSSMAN,

Referee.

Examination of the plaintiff, ROBERT R. YOUNG, on Wednesday, May 19, 1954, at 10:30 A. M. in the Trial Room of the Association of the Bar, 42 West 44th Street, New York City.

RAY ELBAUM
Certified Shorthand Reporter
154 Nassau Street
New York City

Supreme Court of the State of New York

COUNTY OF NEW YORK

ROBERT R. YOUNG, *et al.*,

Plaintiffs,

—against—

PERCY J. EBBOTT, *et al.*,

Defendants.

Before:

HON. HARRY GROSSMAN,

Referee.

[144] Continued examination of the plaintiff, ROBERT R. YOUNG, on Thursday, May 20, 1954, at 10:30 A.M., in the Trial Room of the Association of the Bar, 42 West 44th Street, New York City.

RAY ELBAUM
Certified Shorthand Reporter
154 Nassau Street
New York City

[184] by Mr. Friendly:

Q. Could you tell us, Mr. Young, what the relationship of Investors Mutual Incorporated and Investors Diversified Service System is in a general way? A. The Mutual is the Mutual Company whose investments of theirs are managed by the I. S. A.

Q. What is I. S. A.? A. That is a wholly-owned subsidiary of I. D. S.

Q. And is Investors Mutual a subsidiary of one or the other of those companies? A. I think it could be called a subsidiary, yes.

[185] Q. Who were the principal owners of [186] Investors Diversified Service System? A. Alleghany owned more than a majority of the voting shares. The balance of the voting shares and the non-voting shares are widely held except for an important block owned by the Murchison interests.

Q. That was the block that was sold to them late in 1953? A. Well, they were already large owners before we sold them that block.

Q. Had they become large owners through purchases on their own account? A. Yes.

Q. And you and Mr. Kirby are substantial owners? A. Yes, some of the stock sold to the Murchisons I sold, unfortunately.

Q. You sold it to them at $125 a share? A. No, I think I sold, it seems to me it was around 90, I am sorry to say.

Q. And that stock had cost you $8.00 a share? A. I don't remember the cost. It was very little.

Q. But you had acquired it from the company directly, had you not?

Mr. Daly: I think now we are going a little bit far afield. I assume you are inquiring under [187] Item 10, but I don't see what stock ownership has to do with that, and I am objecting to the continuation of this line of inquiry.

Mr. Friendly: I am inquiring as to the nature and testimony of Mr. Young and I. D. S., and how I. D. S. became involved in this proxy.

Mr. Daly: Now you are asking about the sale of some stock which has nothing to do with it at all.

The Referee: I will allow the question.

The Witness: What was the question?

Mr. Friendly: The question was whether you had acquired at approximately $8.00 a share from Alleghany stock of I. D. S. which you subsequently sold at 90, and which now you say is worth considerably more.

The Witness: Mr. Kirby and I acquired certain I. D. S. shares from Alleghany in exchange for certain other valuable securities, all as approved by the stockholders of Alleghany Corporation.

[188] by Mr. Friendly:

Q. And you acquired the I. D. S. stock for $8 a share in 1950, although it earned about $20 that year, didn't you?

Mr. Daly: Now, I object to this. It is completely irrelevant.

The Referee: I will sustain it.

By Mr. Friendly:

Q. Who is Chairman of the Board of I. D. S.? A. Robert Purcell.

* * * * *